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No. 93-676

In the Supreme Court of the United States

OCTOBER TERM, 1993

MICHAEL J. CARPENTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibits Congress from authorizing the Judge Advocates General to select commissioned officers in the military to serve as courts-martial trial judges and judges of the courts of military review.

2. Whether due process requires that military judges have a fixed term of office.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-20a, is reported at 37 M.J. 291. The opinion of the Coast Guard Court of Military Review, Pet. App. 21a-34a, is reported at 34 M.J. 506.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 3, 1993. The petition for a writ of certiorari was filed on October 29, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1992).

STATEMENT

Petitioner, a member of the United States Coast Guard, was convicted of two specifications of assault with a dangerous weapon, one specification of impersonating an agent of superior authority, two specifications of willfully damaging military property, and one specification of dereliction of duty in violation of Articles 128, 134, 108, and 92 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 928, 934, 908, and 892. He was sentenced to confinement for 15 months, a dishonorable discharge from the Coast Guard, and a reduction to the lowest enlisted paygrade (E-1). Pet. App. 22a. The convening authority approved the findings and sentence. The Coast Guard Court of Military Review affirmed the findings and the sentence. *Id.* at 33a. The Court of Military Appeals granted discretionary review and affirmed. *Id.* at 17a.

DISCUSSION

1. Petitioner presents two claims. First, he argues that the military trial and appellate judges in his case were not qualified to hold those positions because they were appointed to them by the General Counsel of the Department of Transportation, in his capacity as Judge Advocate General of the Coast Guard, in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. Pet. 13-19. Second, petitioner contends that his trial and appeal to the Coast Guard Court of Military Review were fundamentally unfair because the military judges sitting on those courts do not enjoy a fixed term of office and can be reassigned to other military duties by the General Counsel of the Department of Transportation

(DOT) based on his evaluation of their performance as judges. Pet. 19-21.

Those claims are not materially different from the questions presented in *Weiss* v. *United States*, No. 92-1482 (argued Nov. 3, 1993), in which this Court has already heard oral argument. Accordingly, we believe that the petition should be held until this Court has decided *Weiss* and should then be disposed of as appropriate in light of the Court's decision in that case.

2. In addition to relying on the arguments made by the servicemembers in *Weiss*, petitioner argues that he is entitled to relief for two additional reasons. Neither one, however, has merit.

a. Petitioner argues that the Court's decision in *Weiss* will not be controlling here, because one of the members of the Coast Guard Court of Military Review, Chief Judge Baum, is a civilian, whereas in the two cases that were consolidated in this Court in *Weiss* (*United States* v. *Weiss* and *United States* v. *Hernandez*) the trial judges and all of the members of the Navy-Marine Corps Court of Military Review were servicemembers. He claims that the germaneness doctrine of *Shoemaker* v. *United States*, 147 U.S. 282 (1893), is inapplicable to this case, because Chief Judge Baum is not a military officer. Pet. 15-16.

The Court of Military Appeals, however, agreed with petitioner that Chief Judge Baum was improperly assigned to serve on the Coast Guard Court of Military Review by the General Counsel of DOT; the Court of Military Appeals thus ruled in petitioner's favor on the question presented in the petition. That court nonetheless upheld petitioner's conviction by

invoking the de facto officer doctrine. Yet the question presented in the petition does not challenge that court's ruling in this respect. Thus, petitioner's claim that the Court of Military Appeals misapplied the de facto officer doctrine is not properly before this Court. See *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, No. 92-1123 (Nov. 30, 1993). In any event, the Court of Military Appeals correctly relied on the de facto officer doctrine, for the reasons given in our brief in *Weiss* (at 22-24).*

b. Petitioner argues that there is an additional due process infirmity in his case because four of the five judges on the Coast Guard Court of Military Review do not serve in that position on a full-time basis. Pet. 20-21. That is true, but immaterial. As we explained in our brief in *Weiss* (at 39-41), petitioner must prove that judges of that court are expressly or impliedly biased against servicemember defendants; that he cannot do. There is no reason to believe that the assignment to a judge on the Coast Guard Court of Military Review of responsibilities in addition to his duties as a judge will materially increase the risk that he will be biased in favor of the prosecution. Moreover, because the Coast Guard is smaller in size than (for example) the Army, the Coast Guard often must assign a wider range of duties to its officers. Accordingly, the assignment of additional duties to Coast Guard judges serves a valid purpose and does not pose an impermissible risk of command influence.

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* We have supplied petitioner's counsel with a copy of our brief in *Weiss*.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Weiss* v. *United States*, No. 92-1482 (argued Nov. 3, 1993), and then should be disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

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DECEMBER 1993